Supreme Court, U.S.
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In The

Supreme Court

of the United States

October Term 1997

JAMES J. SHEEHAN,

Petitioner,

vs.

DAILY RACING FORM, INCORPORATED,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

James Sheehan filed a claim for age discrimination under the ADEA. Summary judgment was entered for the defendant and against the Plaintiff. The District Court granted Defendant's Motion for Summary Judgment finding that Plaintiff had not presented direct evidence of age discrimination and could not make out a prima facia case as a matter of law. The Seventh Circuit upheld that decision. The two questions presented here are:

I. What are the necessary elements to make out a prima facia case under the ADEA, in light of the open question presented in *O'Connor v. Consolidated Coin Caterers, 116 S. Ct. 1307 (1996)*[1]?

II. What constitutes direct evidence in an age discrimination claim sufficient to allow the Plaintiff to avoid the *McDonnell Douglas* formula and proceed to trial under the direct method of proof?

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[1] In *O'Connor* this Court noted at page 1309 that it had never had the occasion to decide whether the McDonnell Douglas application would apply in an ADEA context.

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No.

In The

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October Term 1997

JAMES J. SHEEHAN,

Petitioner,

vs.

DAILY RACING FORM, INCORPORATED,

Respondent.

The Petitioner, James J. Sheehan, respectfully prays that a writ of certiorari be issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled proceeding on January 15, 1997.

OPINIONS BELOW

The opinion and judgment of the Seventh Circuit Court of Appeals, dated January 15, 1997, was reported, a copy of that Order is reproduced in the Appendix at page App. 1. A Petition for Rehearing to the Seventh Circuit was filed on January 29, 1997. The Petition was denied on February 25, 1997. Plaintiff appeals from the decision of January 15, 1997.

A copy of the United States District Court for the Northern District of Illinois, Eastern Division, granting summary judgment to the Defendant was dated April 10, 1996, a copy of that Order is reproduced in the Appendix at App. 2.

On January 15, 1997, the Seventh Circuit Court of Appeals upheld the District Court granted Defendant's Motion for Summary Judgment finding that Plaintiff had not presented direct evidence of age discrimination and could not make out a prima facia case as a matter of law.

JURISDICTIONAL STATEMENT

The United States District Court for the Northern District of Illinois, Eastern Division had jurisdiction over this action pursuant to 28 U.S.C. § 1343(4) and 29 U.S.C. § 216, 626(c)(1), the Age discrimination in Employment Act of 1967 (ADEA) as amended; the Civil Rights act of 1991 and; the Fair Labor Standards Act, 2 U.S.C. § 216.

The Jurisdiction of the United States Court of Appeals for the Seventh Circuit was invoked pursuant to 28 U.S.C. § 1291.

The Jurisdiction of the Supreme Court to review the judgment of the Seventh Circuit is invoked pursuant to 28 U.S.C. § 1254.

STATUTES INVOLVED

Age Discrimination in Employment Act (ADEA)
29 U.S.C. 621 Et. Seq.

Employer Practices:

a). It shall be unlawful for an employer-

to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individuals age:

to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individuals age; or to reduce the wage rate of any employee in order to comply with this chapter.

Federal Rule of Civil Procedure 56(c)

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

STATEMENT OF CASE

Both the District Court and the Appellate Court held that Plaintiff James Sheehan could not make out a prima facia case of discrimination under the ADEA and that even if Sheehan could make out a prima facia case Sheehan could not show pretext. In addition both Courts held that the memo (27a-30a) prepared to help the decisionmakers decide who to keep and who to terminate and the analysis of that memo was neither direct nor circumstantial evidence of discrimination (despite the inclusion of birth dates) and had no probative value. Defendants Motion for Summary Judgment was granted and Sheehan's case was dismissed.

Defendant employed James Sheehan for 36 years until the time defendant closed its Chicago office in October 1993. In his 36 years with the defendant, Sheehan worked his way up from copy boy to Assistant Editor (also called "Turf Editor"). Sheehan was considered by his supervisor and the General Manager to do an "outstanding job" (the two top employees at the Chicago office). Sheehan was instrumental in redesigning the Chicago system of page layout.

At the time defendant closed its Chicago office it expanded two of its other facilities. In Phoenix, Arizona and Lexington, Kentucky there were approximately 30 Page Editor positions open at the same time as the Chicago closing. Sheehan submitted evidence that he was qualified for the open positions of Page Editor. In fact Sheehan's supervisor and the General Manager both admitted that Sheehan was qualified for the open positions of Page Editor.

Despite the admissions of the two top Chicago employees, Sheehan was not offered a position as Page Editor. Instead Sheehan was terminated. Defendant claimed that Sheehan was not offered the Page Editor position because the position required a computer background that Sheehan did not have.

In response to defendants proffered business reason Sheehan submitted material questions of fact showing defendants reason to be pretextual. In particular Sheehan presented evidence that none of the employees had significant computer background and none of the employees had done very well in computer training but that Sheehan was among the best in the computer training. That evidence came in the form of admissions from Sheehan's supervisor and from the computer trainers.

Sheehan also presented a document that was prepared for the decisionmakers to determine who would be retained and who would be terminated at the closing of the Chicago office. (27a-30a) The decisionmakers were located outside of Chicago and had little or no personal knowledge regarding the Chicago employees.

That document was prepared by the General Manager of the Chicago office and lists all of the 'key personnel' from the Chicago office "who should prove valuable in the new environment", their date of birth and a few words about their skills. Of the seventeen (17) employees listed six (6) were 42 years of age or younger. Eleven (11) of the employees were over the age of 42. All six (6) of the younger employees were retained. Nine (9) of the eleven (11) employees over age 42 were terminated. The Seventh Circuit held that both the

document and analysis of the document were not probative evidence of age discrimination.

In affirming the District Court's decision dismissing Sheehan's case pursuant to Summary Judgment the Seventh Circuit stated, "Everyone knows that younger people are on average more comfortable with computers than older people are, just as older people are on average more comfortable with manual-shift cars than younger people are". (5a).

REASONS FOR GRANTING THE WRIT

I. THIS COURT NEEDS TO SET THE STANDARDS FOR A PRIMA FACIA CASE UNDER THE ADEA.

In *O'Connor v. Consolidated Coin Caterers* this Court reiterated that it has never had the occasion to decide whether the McDonnell Douglas formula applied in the Title VII context correctly applies in the ADEA context. *O'Connor v. Consolidated Coin Caterers, 116 S. Ct. 1307 at 1309 (1996).* This Court went on to hold that the Aproper solution to the problem lies not in making an utterly irrelevant factor an element of the prima facie case but rather in recognizing that the prima facie case requires evidence adequate to create an inference that an employment decision was based on a(n) illegal discriminatory criterion. *Id.* at 1310.

James Sheehan worked for defendant from 1955 until his termination in November 1993, working his way up from copy boy, to desk man, to layout editor and finally assistant editor. Sheehan submitted evidence that he was considered an excellent employee. In 1993 defendant closed the Chicago office where Sheehan worked. At the time the Chicago office closed there were at least 30 page editor positions open at locations in Phoenix, Arizona and Lexington, Kentucky. Sheehan's two supervisors testified that Sheehan was qualified to be a page editor, but unlike Sheehan's younger subordinates, he was never offered a position as one. The page editor positions required computer skills that most of the employees were lacking and all attended classes

for that training. Plaintiff submitted evidence that he was considered to be one of the better students in the classes. Defendant contended that Plaintiff's computer skills were not sufficient to allow him to be considered for the open positions.

Defendant filed a motion for summary judgment alleging that Plaintiff did not have sufficient material facts to warrant a jury trial and asking the Court to dismiss Plaintiff's case as a matter of law. Federal Rule of Civil Procedure 56(c) states that Summary Judgment may not be granted unless the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. This Court has held that summary judgment motions must be viewed in the light most favorable to the non-moving party. *Matsushita v. Venus Radio Corp., 475 U.S. 574, 587, 186 S.Ct. 1348, 1356, 89 L.Ed.2d 583 (1986).* Plaintiff contested defendant's Summary Judgment motion and argued that he had direct evidence of discrimination and alternatively that he made out a prima facia case under *McDonnell Douglas* and raised material questions of pretext and fact regarding defendants proposed defense.

The Seventh Circuit held that the *McDonnell Douglas* approach was not designed for a situation in which job requirements change. In so holding the Court misapplied the elements necessary for a Plaintiff to survive a Summary Judgment Motion. The Court also held as a matter of law that "everyone knows that younger people are on average more comfortable with computers than older people are, just as older people are

on average more comfortable with manual-shift cars than younger people are." (5a) The Seventh Circuit cited no authority for this proposition and there was, of course, nothing in the record before the Court to support such a conclusion.

The Seventh Circuit upheld the lower Court's grant of summary judgment. In misapplying the elements necessary to survive Summary Judgment under the ADEA, the Court determined that the best way to salvage the *McDonnell Douglas* prima facia case was to recast Sheehan's case as a hiring case. However, this wasn't a hiring case. Sheehan was an employee of 38 years. When his office was closed there were approximately 30 open positions for page editor at other locations. All of the employees in Sheehan's office had to receive computer training for the open positions. All of the younger employees were offered the open positions and most of the older employees were terminated. The defendant's rationale in not offering Sheehan a position was similar to the discriminatory reason stated by the Seventh Circuit, that older people can't handle computers as well as younger ones, even though Sheehan produced evidence to the contrary.

This Court has long held that one of the purposes of the ADEA is to rid the workplace of stereotypical views of older workers being less capable than younger workers. *EEOC v. Wyoming, 460 U.S. 226, 231, 75 L.Ed.2d 18, 26, 103 S.Ct. 1054, 1057 (1983).* The Seventh Circuit, in misapplying the factors necessary to make out a prima facia case under the ADEA, has now declared an entire occupation (i.e. those requiring computer

skills) as unsuitable for older workers, as a matter of law.

II. IN THE SUMMARY JUDGMENT CONTEXT THIS COURT NEEDS TO CLARIFY WHAT EVIDENCE IS CONSIDERED DIRECT THUS ALLOWING THE PLAINTIFF TO PROCEED TO TRIAL.

In response to defendant's motion for summary judgement, Plaintiff submitted evidence of age discrimination which in the context of this case should be considered direct evidence of discrimination allowing Sheehan to proceed to trial. The District Court and the Seventh Circuit held that the evidence was not direct and that Sheehan did not produce sufficient evidence to warrant a jury trial.

Plaintiff presented the following evidence: a memorandum put together for the decision makers, listing the "key personnel" in production (Sheehan's area) and their birth dates. (27a-30a) (The information from that list was used by the decisionmakers in deciding who to keep and who to terminate). The young people were all retained and the vast majority of the older employee's were terminated. The breakdown was as follows: Over 42:

1. Carl Olson	Terminated	-63
2. James LaVine	Terminated	-60
3. Clyde Aired	Terminated	-59
4. John McEvoy	Kept	-57
5. Jim Sheehan	Terminated	-54
6. William Ensworth	Terminated	-54
7. John O'Hara	Kept	-54

8. Norm Galey	Terminated	-53
9. Jim McManus	Terminated	-51
10. Mike Filisha	Terminated	-51
11. Frank Blue	Terminated	-48

Under 42

12. Ron Uchma	Kept	-42
13. Sam Murray*	Kept	-41
14. Jim Dunleavy	Kept	-37
15. Ira Kaplan	Kept	-34
16. Mark Meyer	Kept	-32
17. Mark Schramm	Kept	-31

(*Murray was offered a job but did not accept)

Plaintiff also presented a statistical analysis of the memorandum that showed statistically significant differences in the ages of those retained and those terminated. The statistical analysis (prepared by Professor Richard Campbell of the University of Illinois, Chicago) concluded that statistically the correlation between age and termination could not have been by AchanceA and age had to be a factor. The Seventh Circuit held that neither the list with the dates of birth nor the statistical analysis was relevant and that they constituted neither direct nor circumstantial evidence of age discrimination.

In fact the Seventh Circuit held that the inclusion of dates of birth was a salient characteristic, like sex. However, in an age discrimination case it is hard to imagine why a person's date of birth (which has to be looked up in records, unlike sex which is usually visible) can be considered a salient characteristic. In this case the Seventh Circuit's analysis is particularly troublesome

given the fact that the information in the memorandum was used to decide whom to retain and whom to fire.

Plaintiff also submitted evidence of his excellent performance as an employee and of his successful training in the computer classes. Both the Editor and the General Manager of the Chicago office admitted that Sheehan was qualified for the open position of page editor. Despite the evidence submitted by Sheehan in the Summary Judgment proceedings Sheehan's case was dismissed on Summary Judgment denying him a trial by jury.

CONCLUSION

The petitioner requests review by the Supreme Court in order to resolve the open question as to the necessary elements to make out a prima facia case under the ADEA. Supreme Court review is also requested to clarify the issue of the evidence necessary in an age discrimination claim to proceed to trial under the direct method of proof thus avoiding the necessity of utilizing the McDonnell Douglas Standard.

These issues are very important in the context of age discrimination litigation as the Supreme Court has never had the occasion to decide whether the McDonnell Douglas formula which is applied in the Title VII context should also be applied under the ADEA. This Court had already noted the potential for misapplication of the McDonnell Douglas standard Under the ADEA in the O'Connor case (supra) and the present case makes clear that irrelevant factors are in fact being utilized by the Courts and important evidence that is adequate to create an inference of discrimination is being discarded.

The Petition for Certiorari should therefore be granted.

Respectfully submitted,

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In the United States Court of Appeals For the Seventh Circuit

No. 96-2123

JAMES J. SHEEHAN,

Plaintiff-Appellant,

v.

DAILY RACING FORM, INCORPORATED,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 94 C 1191--Paul E. Plunkett, Judge.

ARGUED DECEMBER 5, 1996--DECIDED JANUARY 15, 1997

Before POSNER, Chief Judge, and ESCHBACH and EVANS, Circuit Judges.

POSNER, Chief Judge. A plaintiff can avert summary judgment for the defendant in an employment discrimination case either by putting in enough evidence, whether direct or circumstantial, of discriminatory motivation to create a triable issue or by establishing a prima facie case under the McDonnell Douglas formula. See McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). The plaintiff in this case tried both ways of staving off summary judgment, but failed in each.

James Sheehan was an assistant editor in the Chicago office of the Daily Racing Form, which made him the number three man after Shulman, the head of the office, and McEvoy, the editor of the Chicago edition. Sheehan's specialty was layout, and he was good at it. He also functioned as McEvoy's number two man. "Layout" means fitting together the articles in a newspaper or other publication so that each page looks neat and well designed. When done by hand, as Sheehan did it, layout requires a good deal of skill, which Sheehan is admitted to have. As part of the acquisition of the

already-computerized publisher of another racing sheet, however, the defendant decided to convert to a computerized system of publishing. Layout would be done by computer ("electronic pagination") and editions for different cities would be made up in one place and distributed electronically for printing locally. As a result of the substitution of computers for human labor, the Chicago edition of the Daily Racing Form would cease to be published in Chicago, and this portended the eventual closing of the Chicago office as publishing became consolidated in fewer offices. Not only would fewer workers be required but their tasks would be different. Tasks such as layout formerly done by hand would now be computerized and this meant that employees such as Sheehan who had performed those tasks by hand would have to be trained to do them by computer. Their old skills might not be transferable, in just the same way that a skilled portrait painter might prove not to be a skilled photographer. Sheehan had no experience with computers, but along with other employees of the Chicago office he was given several weeks of training. In 1993, when the Chicago office was closed, Sheehan, aged 54, was among the employees of the office who were discharged rather than transferred to other offices of the company.

Sheehan relies on just two pieces of evidence to establish a prima facie case of discrimination by the conventional, or as it is more commonly but confusingly called the "direct," method. (The confusion lies in the fact that the direct method may employ circumstantial evidence along with or for that matter in place of "direct" evidence, Troupe v. May Department Stores Co., 20 F.3d 734, 736 (7th Cir. 1994), which in an employment discrimination case would normally require an admission.) Both pieces of evidence derive from the same document, a list that

Shulman sent to company headquarters almost a year before the Chicago office closed. It is a list of the 17 employees of the office--including Sheehan--whom Shulman wanted the company to retain when the office was closed. Each entry gives the name, job title, date of birth, date of appointment to current job, union affiliation, likely willingness to relocate (on a scale of 1 to 10), and a brief evaluation. Sheehan's entry, which is typical, reads: "Jim Sheehan--Ass't Turf Editor, 3/28/39, 6/9/90, Independent, - 8 - . Good layout and design. Dedicated perfectionist." Actually the list has 18 rather than 17 entries, the eighteenth being Bob Sebring, about whom the memo states: "I have omitted Bob Sebring, Director of Operations, from the foregoing as his value to us is obvious." Of the 17 persons on the list (that is, excluding Sebring), 11 were 48 years old or older and of these only 2 were retained. Six were 42 or younger (there were none between 42 and 48) and all of those were asked to remain. Of the 18--that is, if Sebring is included--12 were 48 or older and 3 of those were retained. Sebring was in his fifties, as was Shulman himself--and since he was the boss of the office about to be closed his head too was potentially on the chopping block, so maybe the list was implicitly a list of 19, not 17. An affidavit by a statistician hired by the plaintiff as an expert witness states that the probability that the retentions in the list of 17 are uncorrelated with age is less than 5 percent. The plaintiff argues that the affidavit, in combination with the fact that the list contains the age (more precisely, the birth date, from which age can of course be readily computed) of each of the employees on the list, establishes a jury issue of age discrimination.

We cannot agree. The listing of birth dates cannot without more be thought evidence of age discrimination. E.g., Timm v. Mead Corp., 32 F.3d 273, 276 (7th Cir.

1994); Gustovich v. AT & T Communications, Inc., 972 F.2d 845, 848-49 (7th Cir. 1992) (per curiam); Armbruster v. Unisys Corp., 32 F.3d 768, 780-81 (3d Cir. 1994); Wilson v. Firestone Tire & Rubber Co., 932 F.2d 510, 514 (6th Cir. 1991). Age, like sex, is a salient characteristic--information that we use to "place" someone we don't know, to help form a picture in our mind of the person. Newspapers when reporting on someone not well known to the public invariably report the person's name and indicate (if the first name doesn't make it obvious) the person's sex. Age or date of birth is required on drivers' licenses and countless other official and unofficial documents and applications. There is no implication of discriminatory motive in the use of age as an identifying characteristic. And remember that the entire list of 17 is of the people whom Shulman thought the company should retain. It is not as if he had been identifying the ones he thought should be retained, and the ones he thought should be discharged, by age and inviting his bosses to make their cuts accordingly.

Equally without evidentiary significance is the statistical analysis of the list of 17; indeed, the analysis was not even admissible under the standard of Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), governing the admissibility of expert testimony, which requires the district judge to satisfy himself that the expert is being as careful as he would be in his regular professional work outside his paid litigation consulting. E.g., Braun v. Lorillard Inc., 84 F.3d 230, 234-35 (7th Cir. 1996); Rosen v. Ciba-Geigy Corp., 78 F.3d 316, 318 (7th Cir. 1996); Daubert v. Merrell Dow Pharmaceuticals, Inc., 43 F.3d 1311, 1316-19 (9th Cir. 1995); cf. Mid-State Fertilizer Co. v. Exchange National Bank, 877 F.2d 1333, 1339 (7th Cir. 1989). Although the expert used standard statistical methods for determining whether there was a significant

correlation between age and retention for the 17 persons on the list, see Michael O. Finkelstein & Bruce Levin, Statistics for Lawyers 157 (1990) (Fisher's exact test), the omission of Sebring and Shulman from the sample tested was arbitrary. The expert should at least have indicated the sensitivity of his analysis to these omissions. More important is the expert's failure to correct for any potential explanatory variables other than age. Completely ignored was the more than remote possibility that age was correlated with a legitimate job-related qualification, such as familiarity with computers. Everyone knows that younger people are on average more comfortable with computers than older people are, just as older people are on average more comfortable with manual-shift cars than younger people are. Three weeks of training might go some distance toward closing the computer-literacy gap, yet it would be more surprising than otherwise if so short a period of training could close the gap completely. The expert could easily have inquired about the feasibility of ascertaining through discovery the history of the use of computers by each of the employees on the list of 17.

What is more, he ignored the fact that the 17 employees held a variety of jobs. Some were unionized workers with no supervisory responsibilities. There were only 2 supervisors--McEvoy and Sheehan, and the former, who was even older than Sheehan, was nevertheless retained. Of the 19 who should have been on the list, 4 were supervisors (Shulman, Sebring, McEvoy, and Sheehan) and the 3 oldest were retained.

The expert's failure to make any adjustment for variables bearing on the decision whether to discharge or retain a person on the list other than age--his equating a simple statistical correlation to a causal relation ("of course, if age had no role in termination, we should expect

that equal proportions of older and younger employees would be terminated"--true only if no other factor relevant to termination is correlated with age)--indicates a failure to exercise the degree of care that a statistician would use in his scientific work, outside of the context of litigation. In litigation an expert may consider (he may have a financial incentive to consider) looser standards to apply. Since the expert's statistical study would not have been admissible at trial, it was entitled to zero weight in considering whether to grant or deny summary judgment.

That leaves the McDonnell Douglas approach to be considered. The approach was not designed for a situation in which job requirements change, although maybe it can be adapted to it. The assumption behind the approach in a case of termination is that the plaintiff was doing fine in his job, lost it, and was replaced by someone younger, or white, or male, or not handicapped, etc. When the job disappears for reasons unrelated to discrimination--and there is no suggestion that the defendant decided to computerize its operations in order to get rid of its older workers, or for any other reason unrelated to bona fide business considerations--the McDonnell Douglas approach has itself to be reconfigured, if not indeed abandoned. Perhaps the way to preserve it here is to recast this case as a hiring case. Sheehan's job--assistant editor with primary responsibility for manual layout--disappeared. It was replaced by a job called "Associate Editor" (Sheehan's job title had been "Assistant Turf Editor") in the defendant's Lexington, Kentucky office, in which publication functions formerly performed in Chicago and elsewhere were consolidated. That job went to McEvoy. No surprise there: McEvoy had lost his job as editor of the Chicago edition, now defunct, and had done very well in his computer training and was therefore a natural for

assignment to a similar position. Since McEvoy was not only better but older than Sheehan, Sheehan cannot satisfy the second step of McDonnell Douglas--the step of proving (in an age discrimination case) that the job for which he was competing went to a younger person. (And not just a day or two younger, either, but substantially younger. O'Connor v. Consolidated Coin Caterers Corp., 116 S. Ct. 1307, 1310 (1996).)

The five persons on the list of 17 who were younger than Sheehan and were retained (a sixth declined the new job he was offered) were given jobs different from the Associate Editor's job that was the counterpart of Sheehan's old job. The fact that younger workers on the list of 17 were retained in other jobs says no more about discrimination than if an automotive engineer fired by General Motors allegedly on grounds of age pointed out that GM had a 17-year-old in its mail room. One of the five, it is true, received a job as Page Editor, and Sheehan claims that he was more qualified for it. His briefs in this court, however, do not discuss the requirements of the job, let alone show that he was more qualified to perform the duties of the job than the person who got it. According to the defendant's uncontradicted submission, the Page Editor was to be a kind of one-man publishing band, who would rewrite articles, enter them together with racing data in the computer, compose an edition, and dispatch it for printing. Sheehan presented no evidence that he was well suited for this demanding and specialized job. He argues that he must be, since as McEvoy's deputy in Chicago he supervised the workers who did the various components of the new Page Editor's job. But of course a supervisor is not automatically qualified to do all his subordinates' jobs. Most executives could not switch places with their secretaries.

AFFIRMED.

United States District Court

NORTHERN DISTRICT OF ILLINOIS

Eastern Division

JUDGMENT IN A CIVIL CASE
CASE NUMBER 94 C 1191

JAMES S. SHEEHAN,
Plaintiff,

vs.

DAILY RACING FORM, INC.,
Defendant

□Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

□Decision by Court. This action came to a hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that defendant, Daily Racing Form,Inc.'s motion for summary judgment is granted
This order is final and appealable.

April 10 1996
Date

H Stuart Cunningham
Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
NORTHERN DIVISION

JAMES J. SHEEHAN,

Plaintiff,

v.

No. 94 C 1191

Hon. Paul S. Plunkett

DAILY RACING FORM, INC.,

Defendant.

MEMORANDUM OPINION AND ORDER

Plaintiff James J. Sheehan has sued his former employer, defendant Daily Racing Form, Inc., for age discrimination in violation of the Age Discrimination In Employment Act ("ADEA"), 29 U.S.C. § 621 et seq. The defendant has moved for summary judgment. For the reasons set forth below, we grant the motion.

Facts

Daily Racing Form ("DRF") is, not surprisingly, a daily publication on horse racing. Prior to its reorganization in 1993, it was headquartered in

Hightstown, New Jersey, although some senior executives maintained offices in Manhattan, where DRF's parent company is located. DRF also had offices in Seattle, Chicago, and Los Angeles. The New Jersey, Chicago, and Los Angeles offices were responsible for the publication of the east coast, midwest, and west coast editions of the paper, respectively.

In 1991, a competitor of DRF's called the Racing Times folded. DRF acquired its assets and liabilities, including state-of-the-art desktop publishing technology and the leases on offices in Lexington, Kentucky, and Phoenix, Arizona. DRF also hired Neil Cook ("Cook"), the former editor of the Racing Times, to integrate the new computer technology into DRF's operations; he eventually became DRF's editor-in-chief. DRF had decided to go high-tech.

The newly-acquired technology ultimately led to the complete reorganization of DRF's operations. For the first time, various functions, including maintenance of statistics and other widely-used information in databases, could be consolidated in Phoenix and yet be accessible by computer to DRF's other offices. This replaced a system under which the regional offices had maintained separate databases and operations.

Most significantly for this case, however, the new computer technology revolutionized the way DRF prepared its regional editions for publication. It did away completely with manual layout editing, and typesetting, which traditionally had been done by employees in three different departments, instead allowing all of these functions to be performed on a

computer screen by a single person known as a page editor. Consequently, the regional editions no longer had to be prepared in the regions in which they were distributed; rather, stories and layouts could be prepared on computer anywhere in the country and transmitted anywhere else for publication. As a result, DRF's headquarters were moved to Phoenix, where it began publishing in 1993, and its Los Angeles and Chicago offices were eventually closed.

This radical change in the way DRF was published led to a concomitant change in the skills it required from its personnel.

Some positions were eliminated completely; others were consolidated and modified to reflect the new mode of operations. And so, when the Chicago office closed, some employees were not offered positions in the reorganized DRF.

Plaintiff James J. Sheehan ("Sheehan") was one of those people. He had begun working for DRF part-time in 1955 as a copy boy while he was still in high school. By 1990, he had been promoted to assistant turf editor. When the Chicago office closed in late 1993, he was fifty-four years old.

In early 1992, Sheehan reported to the turf editor, John McEvoy ("McEvoy"), who was fifty-seven. Both Sheehan and McEvoy ware management, while the five or six copy editors they supervised were union. Everyone in the Chicago office reported to Stan Shulman ("Shulman") , the general manager there, who was over fifty. Shulman, in turn, reported to Cook.

Although Shulman had promoted Sheehan in 1990 based upon McEvoy's recommendation, DRF asserts that Shulman was not thrilled with Sheehan's performance as assistant turf editor. In Shulman's view, Sheehan was so single-minded and such a perfectionist on the manual layout of the paper that he lost sight of the importance of press deadlines. Shulman had to address this issue with Sheehan on several occasions to insure that the paper was produced in a timely fashion.[1] Sheehan does not directly dispute that Shulman spoke to him on this issue, but asserts that he never actually missed a deadline.

In the summer of 1992, DRF began training its personnel throughtout the country on the new computer sytem. All of the editorial managers, incuding Sheehan, spent three weeks in New York for intensive training under the supervision of editor Dennis Redmond ("Redmond"), who had learned the new system from Cook. The editors also received three days of training in Lexington from Sid Fernando ("Fernando") and Duke Dosik ("Dosik"). Both men had been page editors at the Racing Times and were employed by DRF as consultants to train its personnel.

The editorial managers were trained in groups in New York and Lexington. Redmond, Fernando and Dosik reported verbally to Cook and Fantl on the progress each manager made in learning the new system. DRF asserts that Sheehan received the same amount of training as the other editorial managers; Sheehan

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[1] Brian Fantl, DRF's director of human resources, was aware of this problem also. (Fantl Dep. at 70.)

counters that others, in particular Mark Meyer, received more. In any event, Redmond reported that Sheehan was a slow learner and had trouble picking things up. Overall, Redmond's assessment was that Sheehan would not have "worked very well witht the new system and the new way the paper was set up where everybody was sort of doing a little bit of everything," (Redmond Dep. Tr. at 12, 19-20), and he ranked Sheehan lower than the other two editorial managers who trained with Sheehan. Similarly, Fernando ranked him third lowest out of the four editors in his group (Fernando Dep. at 13-14), while Dosik thought that he was not an exceptional student. (Dosik Dep. at 14.).

By late 1992, the word was out that the Chicago office might close.[2] On his own initiative, Shulman sent a memo to Brian Fantl ("Fantl"), DRF's director of human resources in New York, dated December 30, 1992 (the "Shulman memo"). In it he listed all of the Chicago personnel, their dates of birth, their dates of employment, their current positions, whether they were union, and brief assessments of their qualifications and weaknesses.[3] There were seventeen employees listed; twelve, including Sheehan, were over forty years of age,

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[2] The possibility of closing the Chicago office was first discussed in early 1992. (Shulman Dep. at 11-12.)

[3] Fantl had not requested the memo and never sought any information on the ages of the Chicago employees. Shulman explained that he included dates of birth only to provide as much information as possible, but that ages were not considered in making any employment decisions.

and five were older than Sheehan. (Id.) The two employees not listed, Shulman and Bob Sebring, the forty-seven year old director of operations,[4] were also in the protected age group.

In the memo, shulman said of Sheehan, "Good layout and design. Dedicated perfectionist." (Fantl Dep. Ex. 1 at 1.) Shulman commented that McEvoy, the only editor older than Sheehan, had "[e]xtraordinary knowledge of the industry, with an extensive network of contacts. Good supervisor, has some problems delegating (Id.)

In the first half of 1993, DRF moved two Chicago employees, Mark Meyer ("Meyer") , a newly-prontoted assistant editor, and Ira Kaplan ("Kaplan"), a copy editor, to its new Lexington office. In his memo, Shulman had commented that Meyer, who was thirty-one years old, had "[e]xceptional layout, and page design. Does our special editions and inserts. Good writer. One of my best and brightest." Id. Meyer had also recieved outstanding evaluations from redmond, Dosik and Fernando on his grasp of the new computer system. He was transferred to Lexington as an assistant editor. Similarly, Shulman had said of Kaplan, who was thirty-tree years old, "[e]xcellent writer, handicapper and editor. Full of enthusiasm and willing to try anything. Good Bio writer." Id. According to Fantl, not all copy editors could write and handicap, so Kaplan presented a "more complete package." (Fantl Dep. at 31.) kaplan had also received superior evaluations during his computer training. He was transferred to Lexington

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[4] Shulman noted in the memo that he had omitted Sebring because "his value to us is obvious." Id.

as one of the new page editors.

By late summer 1993, DRF had notified Cook that the Chicago office would be closed and editorial production would be concentrated in Phoenix and lexington. As a result, all editorial positions in Chicago were eliminated. Cook, with some input from Fantl and Shulman, decided who would be offered positions in Phoenix and Lexington based upon the skills DRF required in thos loacitons. DRF asserts that Cook did not consider anyone's age in making those decisions, although Sheehan disputes this. There is no evidence that Cook ever saw the Shulman memo.

Cook decided to retain McEvoy as an Associate Editor because of his superior writing skills. DRF allowed McEvoy to work on a computer from his home in Chicago, where he wrote articles on the midwest racing circuit. Cook did not offer Sheehan a transfer as a page editor, a non-supervisory position, because Cook thought he lacked writing and handicapping skills and because he had not done well during his training on the new computer system.[5] Sheehan disputes this assessment. Cook did not place weight on Sheehan's past performance at DRF because the new mode of operations required different skills. DRF also kept Shulman, who was transferred to Phoenix as director of printing, and Bob Sebring.

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[5] Shulman thought that, given time, Sheehan could have handled the position of page editor. (Shulman Dep. at 23.)

Cook offered transfers to three non-management employees from the Chicago office as well. Jim Dunleavy ("Dunleavy"), a thirty-seven year old copy editor, was given a position in Lexington as a page editor. This decision was based upon Dunleavy's skills as a copy editor, writer, and handicapper, and his ten years of experience in the track and field division. Sheehan asserts that the reasons given for Dunleavy's selection over him as a page editor are pretextual because Sheehan had thirty-one years more experience and had been Dunleavy's supervisor. Mark Schram ("Schram"), a thirty-one year old selector, was sent to Phoenix as a handicapper because Cook believed he was one of the best handicappers and writers in the Chicago office.[6] Sheehan disputes that Schram had any significant writing experience and that he was any better at handicapping than older employees in the Chicago office who were not retained. Ron Uchman ("Uchman"), a forty-two year old writer and handicapper, was kept on as a field correspondent/handicapper to cover the Chicago-Arkansas racing circuit.

DRF's Chicago office closed in late October or early November of 1993. Sheehan filed charges with the EEOC and the Illinois Human Rights Commission on November 13, 1993. He filed this action on February 28, 1994.

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[6] A selector worked in the statistical department selecting horses, handicapping, and writing.

Discussion

Rule 56(c) of the Federal Rules of Civil Procedure allows us to grant summary judgment "if the pleading, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." In considering the evidence submitted by the parties, we do not weigh it or determine the truth of asserted matters. Anderson v. Liberty Lobby. Inc., 477 U.S. 242, 249 (1986). We are to view all facts and draw all reasonable inferences in the iight most favorable to the non-moving party. Transamerica Ins. Co. v. South, 975 F.2d 321, 327 (7th Cir. 1992). "If no reasonable jury could find for the party opposing the notion, it must be granted." Hedbera v. Indiana Bell Tel. Co., 47 F.3d 928, 931 (7th Cir. 1995) (citing Anderson, 477 U.S. at 248).

A plaintiff seeking to prove age discrimination has two possible avenues. Either the plaintiff may present direct or circumstantial evidence that age was a determining factor in his or her termination,[7] or he or she may use instead the burden-shifting mehtod of proof for Title VII cases that was originally set out in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).[8] Anderson v. Baxter Healthcare Corp., 13 F.3d

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[7] "Determing factor" does not require that age was the only factor, but rather that the plaintiff would not have been discharged but for his or her age. Wolf v. Buss (America), Inc., 77 F.3d 914, 919 (7th Cir. 1996).

[8] The use of this burden-shifting approach was extended to age discrimination cases in Kephart v.

1120, 1122 (7th Cir. 1994).

We consider first whether Sheehan has presented any direct or circumstantial evidence of age discrimination, for if he has, we need not employ the McDonnell Douglas analysis at all. Sheehan asserts that he has two pieces of direct evidence: the Shulman memo, because it lists each employee's age, and the report of his statistical expert, Dr. Richard Campbell ("Dr. Campbell"). Dr. Campbell performed a statistical analysis on the retention rate by age of DRF's Chicago office employees listed on the Shulman memo and determined that there was an "association," as that term is used in statistics, between the vairables of age and termination in tha older employees were terminated in disproportionate numbers. On this basis, Dr. Campbell concluded that the termination rate of older employees could not have occurred by chance. DRF counters that neither piece of evidence is direct evidence of age discrimination, and it attacks the validity of Dr. Campbell's conclusions.

Sheehan's argument that the Shulman memo is direct evidence of age discrimination is unpersuasive. There is no suggestion in the record that Neil Cook, the person responsible for making the decisions regarding to the Chicago office employees, ever saw it. While Sheehan hints that the memo is evidence of Shulman's

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Institute of Gas Technology, 630 F.2d 1217 (7th Cir. 1980) (per curiam). See Shager v. Upjohn Co., 913 F.2d 398, 401 (7th Cir. 1990). The Supreme Court has not decided the issue. See O'Connor v. Consolidated Coin Caterers Corp., __ S. Ct. __, 1996 WL 142564 (U.S. April 1, 1996).

discriminatory intent, rather than Cook's, his interpretation of it is belied by the record, which shows that Shulman wanted Sheehan retained and thought he was capable of being a page editor. And, it is undisputed Shulman did not make the decision to terminate Sheehan. Furthermore, Sheehan has not linked shulman's conduct in incorporating the employees' dates of birth in his memo to any discriminatory animus on the part of Cook. See Courtney v. Biosound. Inc., 42 F.3d 414, 419 (7th Cir. 1994) (employee's discriminatory intent must be attributable to primary decision maker).

Dr. Campbell's report fares no better. We have serious concerns about the usefulness and validity of Dr. Campbell's conclusions. For one thing, Sheehan does not even attempt to establish that "association," as the term is used in statistics, is the equivalent of legal causation; he merely assumes that it is so. Yet, if statistical association is something different than legal causation, it is irrelevant here. Dr. Campbell explained "association" as the conclusion that, based upon statistical probabilities, "the results obtained are so unlikely that age and termination are not independent of each other." (Campbell Dep. at 14.) While this definition may look appealing on the surface, Dr. Campbell's deposition testimony reveals its flaws Dr. Campbell testified that the only two variables he considered were age and termination, but that the existence of a statistical association between those two variables does not necessarily mean that one variable caused the other. (Id. at 26.) As he explained, "You can have cases where two variables are associated and one doesn't cause the other." (Id.) He also

acknowledged that his analysis of the Shulman memo was not designed to make any causal inferences. (Id. at 28.) His analysis did not account for the skills of any of the employees listed in the Shulman memo, the skills DRF needed for its new operations, or even the total number of persons in the protected age group who were employed in Chicago, for it omitted Shulman and Sebring, both of whom were over forty. (Id. at 30-31.) It is entirely possible that consideration of these relevant factors would have altered Dr. Campbell's conclusions. See Parker v. Federal Nat'l Mortgage Ass'n, 741 F.2d 975, 980 (7th Cir. 1984) (in rejecting small sample size of twelve employees, court reasoned that small change in underlying raw data would result in dramatic statistical fluctuations).

Most importantly, Dr. Campbell testified that it was beyond the scope of his opinion to determine whether there was any causal relationship between age and termination in this case. (Id. at 32-33.) The obvious consequence of this testimony is that the report is irrelevant and inadmissible. The central issue here is whether or not DRF terminated Sheehan because of his age. If Dr. Campbell's report does not address that issue, and he himself admits that it does not, then the report does not go to any issue in this case, and we have no obligation to consider it.

Sheehan has failed to establish by direct evidence that DRF discriminated against him on the basis of his age. Hence, we consider whether he can succeed using the McDonnell Douglas burden-shifting analysis. At the first step, a plaintiff must establish a prima facie case of discrimination by showing four things: first, that he or

she was a member of a protected class (age 40 or over); second, that he or she was performing well enough to meet the employer's legitimate expectations; third, he or she was terminated; and fourth, that younger employees were treated more favorably.[9] Robinson v. PPC Indus. Inc., 23 F.3d 1159, 1162 (7th Cir. 1994). The employees who were treated more favorably must have been similarly situated to the plaintiff. Smith v. Cook Cty., 74 F.3d 829, 831 (7th Cir. 1996). If the plaintiff succeeds in establishing a prima facie case, there is a rebuttable presumption of discrimination. Anderson, 13 F.3d at 1122. Then the burden shifts to the employer to show there was a legitimate, nondiscriminatory reason for the plaintiff's termination. Id. If the employer can do so, then the burden shifts back to the plaintiff to establish that the reason articulated by the employer was a pretext for age discrimination. Id. To defeat the employer's motion for summary judgment, the plaintiff must merely,

> "produce evidence from which a rational factfindier could infer that the company lied in saying that it fired... [him] because he was an unsatisfactory worker. If the only reason an employer offers for firing an employee is a lie, the inference that the real reason was a forbidden one, such as age, may rationally be drawn ... The point is only that if the inference be drawn...The point is only that if the inference of improper motive can be drawn, there must be a trial."

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[9] The younger employees need not have been outside the protected age group. O'Connor, 1996 WL 142564, at *2.

Id. (quoting Shager v. Upjohn Co., 913 F.2d 398, 401 (7th Cir. 1990) (emphasis in original)). However, regardless of the shifting burdens, the plaintiff always retains the burden of persuasion. King v. General Elec. Co., 960 F.2d 617, 621 (7th Cir. 1992).

DRF does not dispute that Sheehan satisfies the first and third prongs of the McDonnell Douglas test. It does dispute, however, that he can satisfy the second prong. It argues that the competency of Sheehan's performance should not be determined on his past accomplishments in manual layout and editing, but rather on how well he adapted to and grasped the new computer technology. Sheehan counters that he had always performed up to DRF's expectations. He asserts that both McEvoy and Shulman thought he was qualified for the new position of page editor, and that they were judgments about the skill levels of Sheehan and the other Chicago employees. He also contends that the decision on which Chicago employees. He also contends that the decisions on which Chicago employees were offered page editor positions were made by consensus between Cook, Fantl and Shulman.[10]

We agree with DUF that the appropriate assessment of Sheehan's performance *was* his grasp of the new computer technology, for Sheehan has not disputed DRF's evidence that the new system was a radical departure from its past mode of operation. The assessment of Sheehan's computer skills was made initially by Redmond, Fernando, and Dosik, and was

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[10] The record does not support this conention. Shulman testified that he had no authority over who was retained. (Shulman Dep. at 21-22.)

communicated to Fantl and Cook, who gave it significant weight in deciding who to retain when the Chicago office closed. It is undisputed that DRF needed these computer skills in its page editors and that Fernando and Dosi, former page editors with the Racing Times, and Redmond were qualified to assess the progress of Sheehan and the other DRF employees in learning the flew system In addition, the undisputed evidence shows that the same standards were applied to all the editorial managers in evaluating their performances during training. while Sheehan asserts that McEvoy and Shulman were in the best position to assess his abilities, he can point only to their familiarity with his past performance under the manual layout system. He has offered no evidence that they possessed any particular knowledge either about the new computer system or about his aptitude for it which qualified them to assess how he would perform as a page editor. As a result, Sheehan has not shown that DRF's expectations of him with regard to the new system were not legitimate, and he has not shown that he met those expectations consequently, he cannot satisfy the second prong of the McDonnell Douglas analysis.

Sheehan also cannot satisfy the fourth prong of the analysis because he has not shown that younger employees were treated more favorably. He asserts that Meyer, Dunleavy and Kaplan, all of whom were younger than he was, were treated more favorably, because they were given positions in Lexington. However, all three had been non-supervisory copy editors in Chicago, only Meyer, who was transferred several months before Cook was told the Chicago office was be closed, went into a management position. Dunleavy and Kaplan went as

page editors. DRF decided to transfer these three because they had more versatile skills than did Sheehan. Hence, these employees were not similarly situated to him. The only other similarly situated employee in Chicago was McEvoy; he was older than Sheehan, and he was retained.

Even if we found that Sheehan could Rake out a prima facie case, he would fail at the final step of the McDonnell Douglas analysis, for on these facts he cannot show that DRF's reasons for terminating hint were pretextual. DRF has articulated legitimate, non-discriminatory reasons for not retaining him, namely, that other employees showed more aptitude for the new computer technology and had more versatile skills which made them better qualified for the available page editor positions. Therefore, the burden shifts back to Sheehan to offer evidence that DRF lied in giving these reasons and that its real motivation was age discrirnination. Sheehan has offered not a shred of evidence suggesting that DRF's assessments of its own personnel needs and of the qualifications of Sheehan and other employees were not sincerely and honestly made.

Even if Cook was wrong in his determination that other employees would make better page editors than Sheehan, we have no evidence that Cook did not honestly believe this to be the case, he would fail at the final step of the McDonnell Douglas analysis, for onthese facts he cannot show that DRF's reasons for terminating him were pretextual. DRF has articulated legitimate, non-discriminatory reasons for not retaining him, namely, that other employees showed more aptitude for the new computer technology and had more versatile

skills which made them better qualified for the available page editor positions. Therefore, the burden shifts back to Sheehan to offer evidence that DRF lied in giving these reasons and that its real motivation was age discrimination. Sheehan has offered not a shred of evidence suggesting that DRF's assessments of its own personnel needs and of the qualifications of Sheehan and other employees were not sincerely and honestly made.

To succeed at this step, Sheehan could, for example, offer evidence that Redmond, Fernando, and Dosik had thought his computer skills were superior, but that Cook ignored their evaluations and retained someone younger. A plaintiff may produce evidence suggesting that his or her poor evaluations were manipulated to cover up age discrimination. See Shager, 913 F.2d at 400 ("There is evidence that Shager's deficiencies were exaggerated and in any event that they pale beside his outstanding sales performance, inexplicably rated marginal by his hostile supervisor."). But Sheehan has not offered a bit of evidence of this type. Instead, he merely disputes the accuracy of the assessments that were made. But, "[m]isquided and unfair personnei assessments are not actionable under the ADEA unless age played a role in the evaluation." Robinson, 23 F.3d at 1164. Sheehan has not shown that his age played any role here.

Sheehan has failed to establish that DRF discriminated against him on the basis of his age either by direct evidence or under the McDonnell Douglas burden-shifting analysis. Because there is no genuine issue of material fact and DRF is entitled to judgment as a matter of law, we grant its motion for summary

judgment.

Conclusion

For the forgoing reasons, we grant defendant Daily Racing Form, Inc.'s motion for summary judgment. This order is final and appealable.

ENTER:

_____
UNITED STATES DISTRICT JUDGE

DATED:_____.

*(Printer's Note) Document not in its original entirety. Handwritten notes omitted

INTER-OFFICE COMMUNICATION
DAILY RACING FORM - CHICAGO

December 30, 1992
MEMO TO:BRIAN FANTL
FROM: STAN SHULMAN
SUBJECT: Key Personnel - Production

Herewith an evaluation of the Chicago production staff members who should prove valuable in the new environment. Classification; birth date; hire date; union affiliation, and my subjective guess, on a scale of 1 to 10 (10 being very likely) of their willingness o relocate, follow the employee's name, in that order:

John Mc Evoy - Turf Editor, 5/10/36, 10/12/64, Independent -7-. Extraordinary knowledge of the industry, with an extensive network of contacts. Good supervisor, has some problems delegating.

Jim Sheehan - Ass't Turf Editor, 3/28/39, 6/9/60, Independent, -8-. Good layout and design. Dedicated perfectionist.

Mark Meyer - Nominated as Ass't Turf Editor, 8/1/61, 5/5/89, OPEIU, to become Independent, -10-. Exceptional layout, and page design. Does our special editions and inserts. Good writer. One of my best and brightest.

Jim Dunleavy - Copy Editor, 8/6/56, 1/11/91 (to Chicago), OPEIU, -9-. Trackman who came in out of the cold. Excellent handicapper with statistical background. Good writer, also does Bios.

Ira Kaplan - Copy Editor, 9/14/59, 8/3/89, OPEIU, -10-. Excellent writer, handicapper and editor. Full of enthusiasm and willing to try anything. Good Bio writer.

Sam Murray - Copy Editor, 12/4/51, 3/11/87, OPEIU, -8-. Excellent copy editor and headline writer, can do Bios. Not fond of the pressures related to press deadlines.

Jim McManus - Copy Editor/Simulcast Coordinator 12/19/41, 9/2/58, OPEIU -6-. Runs photo file and morgue. Competent copy reader and headline writer. Has taken charge of, and developed system for, scheduling and placement of simulcast races.

Mike Filisha - Ass't Statistical Editor, 11/11/41, 10/1/64, Independent -8-. Extensive knowledge of statistical data relevant to PP's. Our off-breed (quaterhorse, Paint, Appaloosa) specialist. Computer friendly, good supervisor, a little too money-oriented.

Norm Galey - Supervisor/PP Verification 8/17/40, 6/25/59, OPEIU, -6-. My validation expert. Methodical and unassuming; very little gets by him. Would rather do the work himself than confront subordinates.

Mark Shramm - Selector/PP Verification. 6/6/62, 6/13/88, OPEIU, -10-. Extremely bright and competent. Does Bios and Analyst's Comments. Versatile and interested.

Ronald Uchman - Handicapper, 7/31/51, 2/4/91, OPEIU, -9-. Hired as our lead Bio writer, also does Analyst's Comments and Sweep Grade. An excellent handicapper.

William Ensworth - Handicapper, 6/27/39, 9/10/56, OPEIU -7-. Good handicapper, does Spot Plays, Sweep Grade and Analyst's Comment. Writes adequate Bios.

Frank Blue, Handicapper, 1/28/45, 8/22/63, OPEIU, -8-. Probably our best handicapper, but doesn't type and has poor writing ability.

James La Vine - Foreman, 8/6/33, 2/8/64, CTU (guaranteed), -7-. Extensive knowledge of edition configuration, replating, layout and makeup. An aggressive, goal-oriented achiever, complete with the attendant personality flaws.

John O'Hara - Ass't Foreman Pasteup/Layout, 12/25/38, 5/6/87, CTU (nonguaranteed), -8-. An easier-going version of La Vine, with much the same ability. Computer, friendly, a good supervisor.

Clyde Alred - Ass't Foreman Data-Entry, 9/5/34, 12/9/70, CTU (Guaranteed), -7-. Computer friendly. Our "wizard", specializes in massaging our system to get the job done. Has knowledge of copy flow and page make-up. Does not handle pressure or confrontation well.

Carl Olson - Communications Supervisor 2/28/30, 6/22/61, Independent, -8-. Extensive knowledge of procedures and copy flow from, and to, racetracks. Keeps us appraised of material received and missing, bottlenecks and delays. Excellent rapport with our field crews.

I have omitted Bob Sebring, Director of Operations, from the foregoing as his value to us is obvious. The only question in my mind is where his talents can be best utilized, and how many places he can be at one time.

Supreme Court, U.S.
FILED
MAY 19 1997
OFFICE OF THE CLERK

No. 96-1668

In The

Supreme Court of the United States

October Term, 1996

JAMES J. SHEEHAN,

Petitioner,

vs.

DAILY RACING FORM, INCORPORATED,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO CERTIORARI

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QUESTION PRESENTED

Should this Court issue a Writ of Certiorari to reconsider the concurrent findings of fact by the District Court and the Court of Appeals, which findings resulted in summary judgment in favor of an employer based on a discharged employee's failure to submit sufficient evidence of a violation of the Age Discrimination In Employment Act, 29 U.S.C. § 621, et seq.?

RULE 29.1 LIST

Respondent Daily Racing Form, Inc. is a subsidiary of KIII Communications Corp. and has the following wholly owned subsidiaries: DRF Finance Inc. and Daily Racing Form of Canada, Ltd. Daily Racing Form, Inc. has no non-wholly owned subsidiaries of its own.

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BRIEF OF RESPONDENT IN OPPOSITION TO CERTIORARI

Respondent, Daily Racing Form, Inc., respectfully requests that this Court deny the Petition For Writ Of Certiorari, seeking review of the Court of Appeals' unanimous opinion in this case. That opinion is reported at 104 F.3d 940 (7th Cir. 1997) (Posner, J.).

STATEMENT OF THE CASE

Petitioner James J. Sheehan's ("Sheehan") Statement of the Case incompletely described the facts presented to the District Court and the Court of Appeals which justified summary judgment for the employer in this case. The unanimous opinion affirming the judgment of the District Court carefully and thoroughly examined the entire record for material facts tending to demonstrate discriminatory conduct by the employer and found none.

The Court of Appeals could find no evidentiary basis in the record for Sheehan's age discrimination claim. The Court of Appeals noted that Sheehan relied on just two pieces of evidence to prove discrimination by the direct method, the "Shulman Memo" and a statistical analysis of the memo. (Petition Appendix ("Pet. App.") 2a-3a.) Yet Sheehan failed to introduce any supplementary evidence demonstrating that the listing of birth dates in the Shulman Memo actually constituted evidence of discrimination rather than a recital of one of several salient characteristics. Nor did the statistical analysis meet this Court's threshold requirements for admission into

evidence as set out in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

Moreover, Sheehan could not submit any indirect evidence that younger comparable employees were treated more favorably because the manager who was retained was both older and more capable than Sheehan. (Pet. App. 6a-7a.) Sheehan also did not submit evidence that he could perform the electronic pagination, writing and handicapping duties necessary to act as a Page Editor, let alone do it better than the individual transferred to that position. (Pet. App. 7a.)

Consequently, the "Questions Presented" as framed by Sheehan's Petition assume facts not supported by the record in this case and are merely designed to obscure Sheehan's purpose of asking this Court to review the factual record to determine whether the Court of Appeals properly affirmed on the basis of Sheehan's evidentiary failings.

In 1993, Daily Racing Form completed the revolutionary process of converting its publishing operations to electronic pagination and thereby completely changed the methods by which it published its newspapers over the last thirty years. (Pet. App. 10a-11a.) Entire job classifications were rendered redundant as the tasks either became totally irrelevant or were merged into other positions. For example, one "Page Editor" could use a personal computer to electronically perform the functions of the former data entry personnel, editors, copy editors, writers, statisticians and compositors and then transmit synchronized editions to remote print sites around the

nation. (*Id.*) As development of the new systems progressed, Daily Racing Form also determined that it could eliminate its Chicago Edition and merge those functions into its new bureau in Phoenix, Arizona. (Pet. App. 7a.) Consistent with the elimination of regional editions and manual layout, Daily Racing Form also eliminated the Turf Editor and Copy Editor positions and merged most of those functions into the new Page Editor position. (Pet. App. 10a-11a.) Of the two remaining Turf Editors in Chicago, John McEvoy was transferred to a new Assistant Editor position while McEvoy's younger assistant, Sheehan, was not retained.

Although Sheehan brought an ADEA claim, the only reference to Sheehan's age in the record appears in a memo written in December of 1992, by Chicago's General Manager, Stanley Shulman. Suspecting that electronic pagination would lead to staffing changes in Chicago, Shulman drew up the Schulman Memo to identify the subordinates which had proved valuable to him. He did not, however, share the memo with Editor Neil Cook, who ultimately was charged with making editorial staffing decisions after the decision was made to close Chicago in the summer of 1993. (Pet. App. 15a, 18a.) Nevertheless, the Shulman Memo is consistent with Cook's perception that Sheehan was the least versatile of the Turf Editors and underscores Sheehan's relative lack of versatility with respect to the unionized employees.

During the Summer of 1992, Daily Racing Form made an extensive effort to retrain its editorial staff, including Sheehan, to prepare for the introduction of electronic pagination. (Pet. App. 12a.) Cook directed the training and the trainers reported directly to him. (*Id.*) Sheehan

was trained with a small group for three weeks and trained again with a second group for three days. (*Id.*) The trainer who spent three weeks with Sheehan ranked him at the bottom of his group and found him unqualified for a Page Editor's position, while another trainer ranked him as third lowest out of four. (Pet. App. 13a.)

When Cook was informed in the late summer of 1993 that Daily Racing Form would close the Chicago Edition, he looked to redeploy his editorial assets consistent with the few openings available. (Pet. App. 15a-16a.) Cook created an Associate Editor position for McEvoy, who was older than Sheehan, to take advantage of McEvoy's writing skills. (Pet. App. 15a.) Cook believed, however, that Sheehan lacked writing and handicapping experience and that he had done poorly in training. Therefore, Cook did not offer Sheehan reassignment, in effect a demotion, to a nonsupervisory Page Editor position. (*Id.*)

REASONS FOR DENYING THE WRIT

Neither of the Questions Presented by the Petition satisfy this Court's criteria for granting a Writ of Certiorari, nor do they even demonstrate an error on the part of the Court of Appeals. *See* Supreme Court Rule 10. The Petition identifies no conflict with the decision of another United States court of appeals on the issues raised by the Questions Presented and no important question of federal law is implicated by this case.

Sheehan actually quarrels with the Court of Appeals' evaluation of the evidence in the record rather than the legal analysis employed. The Petition is entirely devoted

to citing conflicting interpretations of certain evidence presented in the case, despite both the District Court and the Court of Appeals having found this evidence to be irrelevant when placed in context. This Court, therefore, has no need to address the Questions Presented by Sheehan's Petition because the courts below found that there was no evidence of age discrimination.

Sheehan also suggests that the District Court and the Court of Appeals did not give due weight to the statistical analysis of the Shulman Memo or the Shulman Memo itself. Yet Sheehan does not cite any precedents of this Court, or any other court of appeals, which would require admission of this evidence, let alone hold that it would warrant reversal of a summary judgment.

Although the Petition appears to seek guidance on the application of the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), formula in the ADEA context, it acknowledges that this Court emphasized that the formula should be applied pragmatically, if at all. *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. ___, 134 L. Ed. 2d 433, 438 (1996). Both the District Court and the Court of Appeals explicitly referred to *O'Connor* in fashioning a *prima facie* test to fit the special circumstances of this case. Sheehan objects to the Court of Appeals' analogy to hiring cases, but offers no alternate formula which would have allowed him to survive a motion for summary judgment on this record. Given that none of Sheehan's Questions Presented are supported by the facts of this case or the law, and no conflict in the federal appellate courts exists, the Petition should be denied.

I. PETITIONER'S CLAIM WAS NOT SUPPORTED BY FACTS IN THE RECORD

Sheehan lost below for want of evidence, not because the Court of Appeals decided to enunciate a new legal principle. Critical elements necessary to establish discrimination simply lacked any factual support in the record. Indeed, the District Court's findings of fact received the concurrence of the Court of Appeals. This Court has explained that "a court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Tank & Mfg. Co., Inc. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949). *See also Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987); *Berenyi v. Immigration Director*, 385 U.S. 630, 635 (1967); *NCAA v. Board of Regents*, 468 U.S. 85, 98 n.15 (1984); *Branti v. Finkel*, 445 U.S. 507, 512 n.6 (1980); *Rogers v. Lodge*, 458 U.S. 613, 623 (1982). In sum, the Court of Appeals' decision was confined to the facts of this case and the record readily rebuts Sheehan's complaint that the Court of Appeals ignored the evidence. Consequently, the record in this case will not support the theoretical baggage that Sheehan seeks to append to it.

Although Sheehan emphasizes the Shulman Memo, the Court of Appeals deemed the references to employee birth dates in the Shulman Memo not to be probative for multiple reasons, any one of which would merit exclusion of the document. (Pet. App. 3a-4a.) The Court of Appeals initially noted that birth dates are salient characteristics. Even if the inclusion of birth dates in the biographical

data theoretically could suffice to evidence discrimination, however, the record demonstrates that Shulman preferred to retain Sheehan. (Pet. App. 4a.) Finally, the Schulman Memo cannot be linked to Cook's decision to discharge Sheehan because Cook never saw it. (Pet. App. 15a.)

In addition, Sheehan's statistical "breakdown" of the Shulman Memo randomly excludes persons from its data base and fails to account for numerous critical variables. (Pet. App. 18a-20a.) It also is based largely on statistics from departments other than Editorial, even though Cook had no real say with respect to these departments, which typically were consolidated or eliminated (for example, technology eliminated the need for both the Statistical and Composing departments). (Pet. App. 18a-20a.) Moreover, several employees had transferred *before* the decision was made to close the Chicago Edition and others later declined offers of reassignments to new and different jobs in other parts of the country. (Pet. App. 23a-24a.) When placed in this context, the Court of Appeals correctly found that the statistical analysis derived from the document was not probative of discrimination.

All of Sheehan's evidence concerning his qualifications was immaterial because it only concerned his performance of his former Assistant Turf Editor job, which had been eliminated. It is undisputed that both Shulman and McEvoy thought well of Sheehan but, since the Chicago Edition never utilized Electronic Pagination, neither of Sheehan's supervisors in Chicago had any experience with it. Although Sheehan also cites testimony by his former Chicago supervisors as evidence that he met expectations in his computer training, both men testified

that they had no first-hand knowledge regarding Sheehan's training. (Pet. App. 22a-23a.) In their thirty some years with the Daily Racing Form, neither McEvoy nor Sheehan had ever utilized a computer to publish the newspaper. (Pet. App. 2a, 23a.) Thus, although Sheehan's superiors found him to be a competent Assistant Turf Editor, they lacked any basis from which to evaluate his competence in an electronic environment and were completely unfamiliar with the duties of a Page Editor. (Pet. App. 23a.) Critically, there was no indication in the record that either Shulman or McEvoy told Cook that they believed that Sheehan could perform as a Page Editor. Instead, Shulman believed that it would take time for Sheehan to develop as a Page Editor. (Pet. App. 15a n.5.)

Nor did Sheehan establish that his qualifications were better than those of the employees Daily Racing Form retained and transferred. Ultimately, Cook transferred a Copy Editor with ten years of experience in the track and field division to Lexington as a Page Editor due to his unique experience. (Pet. App. 16a.) Cook reassigned another Copy Editor as a Field Correspondent/ Handicapper to Phoenix because Cook considered him to be one of the best writers and handicappers in the Chicago office. In addition, Cook transferred one employee from the Statistical Department to Phoenix as a Handicapper. Sheehan offered no evidence that he had any experience as either a writer or as a handicapper, or that he could have performed the duties of a Field Correspondent. Although McEvoy believed that Sheehan was a good layout man in the manual paste-up environment, he also testified that Sheehan had done very little writing and no handicapping of horses. (Pet. App. 7a, 23a.)

In sum, the Court of Appeals found that the factual assertions that are repeated in Sheehan's Petition were unsubstantiated in the record. What Sheehan really wants is for this Court to sift through the record to determine whether there was any factual foundation for a discrimination claim. It is not, however, the task of this Court to perform a factual review of a record already perused by the appellate court. *See, e.g., United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."). The Court of Appeals already has examined the factual and legal underpinnings of Sheehan's claim of age discrimination and found them nonexistent.

II. THERE IS NO CONFLICT BETWEEN THE CIRCUITS

Rule 10.1(a) of this Court lists, as the first "compelling" consideration for granting a writ, the rendering of " . . . a decision in conflict with the decision of another United States court of appeals on the same important matter." Sheehan does not contend that any federal appellate court has rendered a decision conflicting with the one at bar. The Court of Appeals itself gave no indication whatsoever that its ruling conflicted with that of any other circuit. *See Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 392-93 (1923) (where circuits "were really in harmony, and not in conflict," then "there was no ground for our allowing the writ of certiorari to add to an already burdened docket").

In particular, the Court of Appeals noted that Sheehan's allegations did not fit into the typical *McDonnell Douglas* paradigm because Sheehan's job was eliminated for reasons other than discrimination. Nevertheless, the Court of Appeals adapted the test by analogizing to hiring situations in order to afford Sheehan the added benefit of an indirect method of proof. (Pet. App. 6a.) Other circuits have employed similar variants of the "basic evidentiary framework set forth in *McDonnell Douglas*" in adapting *McDonnell Douglas* to new factual circumstances. *See, e.g., O'Connor,* 134 L. Ed. 2d at 438; *Rinehart v. City of Independence,* 35 F.3d 1263, 1265 (8th Cir. 1994); *Seman v. Coplay Cement Co.,* 26 F.3d 428, 432 n. 7 (3rd Cir. 1994); *Roush v. KFC Nat'l Mgt. Co.,* 10 F.3d 392, 396 (6th Cir. 1993); *Lindsey v. Prive Corp.,* 987 F.2d 324, 326 n. 5 (5th Cir. 1993); *Goldstein v. Manhattan Indus., Inc.,* 758 F.2d 1435, 1442 (11th Cir. 1985); *Haskell v. Kaman Corp.,* 743 F.2d 113, 119, and n. 1 (2d Cir. 1984); *Cuddy v. Carmen,* 694 F.2d 853, 856-857 (D.C. Cir. 1982); *Douglas v. Anderson,* 656 F.2d 528, 531-532 (9th Cir. 1981); *Loeb v. Textron, Inc.,* 600 F.2d 1003, 1014-1016 (1st Cir. 1979); *Schwager v. Sun Oil Co. of Pa.,* 591 F.2d 58, 60-61 (10th Cir. 1979). That the Court of Appeals determined to employ a variant of the test in this case is consistent with the prevailing practice of the appellate courts.

The exclusion of the statistician's report also is consistent with this Court's standards as enunciated in *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993) and the holdings other appellate courts rendered on closely analogous facts. *See, e.g., Hutson v. McDonnell Douglas Corp.,* 63 F.3d 771, 777 (8th Cir. 1995) (affirming summary judgment in an ADEA case where plaintiff's

statistical evidence failed to analyze treatment of comparable employees or control for most significant variables relied on by employer); *Henson v. Liggett Group, Inc.*, 61 F.3d 270, 276 (4th Cir. 1995) (ADEA statistics must account for demographic information and job categories); *Birkbeck v. Marvel Lighting Corp.*, 30 F.3d 507, 511 (4th Cir. 1994) (same); *Palmer v. United States*, 794 F.2d 534, 539 (9th Cir. 1986) (affirming summary judgment for employer in ADEA case where sample of 15 was too small to have predictive value and must be disregarded).

Similarly, the Court of Appeals' determination that the listing of birth dates alone did not evidence discrimination is consistent with that of other courts of appeal. *See Armbruster v. Unisys Corp.*, 32 F.3d 768, 781 (3rd Cir. 1994); *Wilson v. Firestone Tire & Rubber Co.*, 932 F.2d 510, 514 (6th Cir. 1991). Consequently, there is no need for this Court to intervene by granting the requested writ.

III. THE DECISION OF THE COURT OF APPEALS IS CONSISTENT WITH THIS COURT'S ANALYSIS OF ALLEGED DISCRIMINATION CLAIMS

The Court of Appeals' analysis did not deviate from the analysis employed by this Court for the resolution of age discrimination cases. This Court found no need to address the applicability of the test to ADEA cases last term in *O'Connor*. In *O'Connor*, the Court applied the test after noting that "we have never had occasion to decide whether that application of the Title VII rule to the ADEA context is correct, but since the parties do not contest that point, we shall assume it." 134 L. Ed. 2d at 438. In the

instant case, the Court of Appeals, as in *O'Connor*, proceeded to apply the *McDonnell Douglas* presumptions to the facts. Sheehan does not indicate that any appellate court has endorsed his suggestion that his Questions Presented warrant the attention of this Court. *See State of Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 918 (1950) ("[i]t may be desirable to have different aspects of an issue further illumined by the lower courts" before granting certiorari).

Indeed, Sheehan's request for guidance on the applicability of *McDonnell Douglas* to this case presents only an abstract question. In *O'Connor*, this Court noted that it had not expressly ruled that the burden shifting method of proof should be available to ADEA plaintiffs. Notwithstanding this open question, both the District Court and the Court of Appeals gave Sheehan the benefit of the *McDonnell Douglas* presumptions after they determined that Sheehan lacked any direct or circumstantial evidence of age discrimination. Yet, even *with* the benefit of *McDonnell Douglas* framework of presumptions, Sheehan did not survive summary judgment. At best, *O'Connor* leaves open the question of whether Sheehan should have had the benefit of the *McDonnell Douglas* presumptions at all, an issue that would have absolutely no effect on the outcome of this case, given Sheehan's utter failure of proof under both the direct and indirect methods. To the extent that Sheehan poses a theoretical question not presented by this record, there is no occasion to decide it. *See Baltimore Radio Show, Inc.*, 338 U.S. at 918 ("[i]t may be desirable to have different aspects of an issue further illumined by the lower courts" before granting certiorari.).

The Court of Appeals easily saw through Sheehan's allegation as nothing more than speculation, holding that he had "presented no evidence that he was well suited for this demanding and specialized job." (Pet. App. 7a.) Ironically, Sheehan's Questions Presented seek to *"avoid* the *McDonnell Douglas* formula and proceed to trial under the direct method of proof" (emphasis added), apparently misapprehending that the *McDonnell Douglas* framework was developed to *assist* those plaintiffs, like Sheehan, who lack direct evidence. Avoiding the *McDonnell Douglas* framework would do Sheehan no good at all.

Contrary to the Petition's suggestion, the Court of Appeals conducted a thorough review of the record and concluded that Sheehan's evidence contradicted Sheehan's own theory of recovery. Sheehan appears to raise no question of law at all but to merely seek a redetermination of the facts. But see *United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts.").

CONCLUSION

For all of the reasons stated above, issuance of a writ of certiorari in this case would be improvident. *See Southern Power Co. v. North Carolina Public Service Co.*, 263 U.S. 508 (1924); *Furness, Withy & Co., Ltd. v. Yang-Tsze Ins.*

Assoc., Ltd., 242 U.S. 430 (1917). The Petition for Writ of Certiorari should be denied.

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